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No. 901

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1940

BAKERY AND PASTRY DRIVERS AND HELPERS LOCAL 802 of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, PETER SULLIVAN, individually and as President of the said Union PADDY SULLIVAN, individually and as an officer of the said Union, and HYMAN BERNSTEIN, individually and as business agent of said Union, all of 265 West 14th Street, New York City,

Petitioners,

against

HYMAN WOHL and LOUIS PLATZMAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF

EDWARD C. MAGUIRE,
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Of Counsel:
EDWARD C. MAGUIRE,
SAMUEL J. COHEN.

INDEX

PAGE

PETITION:

I. Summary Statement of Issues Involved 2

A. The facts out of which the action arose 2

The Peddler System 3

B. The nature of the action 5

II. Jurisdiction of This Court 7

III. Questions Presented 8

IV. Reasons for Allowance of Writ 8

National Importance of the Questions at Issue 10

BRIEF:

I. Opinions of Courts Below 13

II. Jurisdiction 14

Date of Entry of Judgment to be Reviewed 14

III. Statement of the Case 14

IV. Specification of Errors to be Urged 14

V. Summary of Argument 15

A) The injunction issued by the State Court violated the constitutional guarantee of freedom of speech and assembly 15

B) There was no local question involved which furnished a basis for deciding this case without reference to the Federal question 15

PAGE

VI. ARGUMENT 15

A) The injunction issued by the State Court violated the constitutional guarantee of freedom of speech and assembly 15

1) The activity in question consisted solely of the peaceful and orderly dissemination of the opinions of the defendant union 15

2) The constitutional guarantees here invoked 18

3) The decision of the New York State Court of Appeals is inconsistent with the decisions of this Court 18

B) There was no local question involved which furnished a basis for deciding this case without reference to the Federal question 23

CONCLUSION 25

TABLE OF CASES CITED

PAGE

American Federation of Labor v. Swing (No. 56, October Term, 1940) 9, 10, 18, 20, 21

Carlson v. California, 310 U. S. 106 ..... 9, 21, 24

Hague v. C. I. O., 307 U. S. 496 ..... 9, 24

Milk Wagon Drivers Union v. Lake Valley Farm Products, 311 U. S. 91 ..... 9, 10, 18, 19, 21

Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc. (No. 1, October Term, 1940) 9, 10, 18, 19, 21

Schneider v. State, 308 U. S. 147 9

Senn v. Tile Layers Union, 301 U. S. 468 9

Thornhill v. Alabama, 310 U. S. 88 ..... 9, 21, 24

STATUTES CITED

Civil Practice Act of New York, Section 876-a 9

Constitution of the United States, Amendment XIV, Section 1 8

United States Judicial Code:

Section 237-b (Title 28, U. S. C., Sec. 344-b) 8, 14

Section 243 (Title 28, U. S. C., Sec. 350) 14

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BAKERY AND PASTRY DRIVERS AND HELPERS LOCAL 802 of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, PETER SULLIVAN, individually and as President of the said Union PADDY SULLIVAN, individually and as an officer of the said Union, and HYMAN BERNSTEIN, individually and as business agent of said Union, all of 265 West 14th Street, New York City,

Petitioners,

against

HYMAN WOHL and LOUIS PLATZMAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable Charles Evans Hughes, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petition of Bakery and Pastry Drivers and Helpers Local 802 of the International Brotherhood of Teamsters, an unincorporated association, and Peter Sullivan, individually and as President of the said Union, and Paddy Sullivan, individually and as an officer of said Union, and Hyman Bernstein, individually and as business agent of said Union, and the petition of each of them, respectfully show unto this Honorable Court:

I. Summary Statement of Issues Involved

A. The facts out of which the action arose.

This case arises out of a labor dispute in the baking industry in New York City.

The disputants involved are the defendant Bakery and Pastry Drivers and Helpers Local 802 of the International Brotherhood of Teamsters, a labor Union affiliated with the American Federation of Labor, and the plaintiffs Hyman Wohl and Louis Platzman, who are engaged in the occupation of peddling bakery products.

The defendant Union conducted admittedly peaceful and orderly picketing for the purpose of protesting against what it believed to be the economic and social evils of the peddler system.

Specifically, the defendant requested that the plaintiff peddlers, who worked seven days each week without respite, each hire a member of the defendant Union as a relief driver for Sundays.

The placards which were used by the defendant Union were as follows:

> "HYMAN WOHL
>
> A BAKERY ROUTE DRIVER WORKS SEVEN DAYS A WEEK WE ASK EMPLOYMENT FOR A UNION RELIEF MAN FOR ONE DAY HELP US SPREAD EMPLOYMENT & MAINTAIN A UNION WAGE HOUR AND CONDITION.
>
> BAKERY & PASTRY DRIVERS & HELPERS
> LOCAL 802 I. B. of T. affiliated
> with A. F. L." (R. 57).

These placards, as appears from the full quotation thereof above, were directed to the attention of the public and merely stated the contention of the Union.

Admittedly, there was no misrepresentation or fraud practiced by the Union by the use of these placards, nor was it claimed by the plaintiffs that there was any misrepresentation or fraud practiced in any other manner (R. 55).

The only picketing which took place occurred at two wholesale bakeries where the plaintiffs had their headquarters and obtained the products which they distributed. These two bakeries were known as Diamond Baking Co., Inc., and Bernstein & Dickerman. The entire picketing in question was extremely brief in duration, and lasted in all about two hours on each of two days (R. 57).

Apart from such picketing the only labor activity in which the defendant Union engaged in reference to this dispute consisted of requesting about five of the retail dealers, who purchased the products peddled by the plaintiffs, not to deal with the plaintiffs, and likewise requesting the two bakery firms above mentioned not to distribute baking products through such peddlers. There was never any picketing of these retail dealers or bakers.

The Peddler System

Briefly, the peddler system, against which the defendant Union protested, was an arrangement whereby wholesale bakers contrived to effect distribution of their bakery products without technically engaging any distribution employees. The peddler furnished the substitute for the orthodox employee. He was invested with the role of independent entrepreneur, purportedly purchasing from the wholesale baker and selling at a profit to the retail dealer. The economic relationship between wholesale baker and peddler, despite the outward change, remained substantially one of dominance by the baker and subservience on the part of the peddler.

The economic status of the plaintiff peddlers, as shown upon the trial, may be considered typical. The plaintiff Wohl had a gross income of approximately $32 per week and the plaintiff Platzman a gross income of approximately $35 per week, out of which income the plaintiffs were required to pay the maintenance and operation costs of the trucks used by them for peddling, and out of which they were also obliged to carry outstanding credits on their routes (R. 56).

During the five years preceding the dispute in question there was a strong trend in the baking industry in the City of New York to dissolve existing employment relations and, in lieu thereof, to deal through peddlers. After the enactment of the Social Security and Unemployment Insurance laws the number of peddlers in New York City rose from 50 to more than 500 in the baking industry alone (R. 50, 51).

During the 18-month period immediately preceding the dispute at least 150 drivers were discharged and required to sever connections with the firms by whom they had been employed unless they undertook to become peddlers (R. 51).

The picketing in question was undertaken in order to prevent the further spread of this evil, and the inevitable deterioration of established Union standards consequent upon the extension thereof (R. 52, 53, 54). After consideration of the menace of the peddler system, the Union entered upon a program calling for the unionization of the peddlers, who were to be admitted to membership, if they were willing to become members of the Union, upon the same terms and pursuant to the same regulations which were applicable to other Union members (R. 52). Picketing was employed by the Union in the controversy in question in support of the program of unionization of peddlers undertaken to protect the Union from further inroads of the peddler system.

It was uncontrovertibly established upon the trial that the peddlers were not covered by social security, unemployment insurance or workmen's compensation insurance (R. 53), that they did not carry public liability or property damage insurance on the trucks which they operated (R. 53, 54) and that they did not conform to any uniform standard of wages or hours, but worked seven days each week (R. 56).

The trucks operated by the plaintiffs were registered in their wives' names (R. 55, 56).

Both of the plaintiff peddlers, Hyman Wohl and Louis Platzman, had previously applied for membership in the defendant Union, and Platzman had become a member but was delinquent in the payment of his duties (R. 52, 53, 149-151).

All of the foregoing matters of fact were definitely found by the Trial Court and we may properly designate them as undisputed facts.

B. The nature of the action.

The present action was commenced by the plaintiffs aforesaid for the purpose of obtaining injunctive relief against the above-mentioned activities of the defendant Union.

After finding the aforesaid facts the Trial Court rendered judgment in favor of the plaintiffs, absolutely enjoining the picketing in question. The injunction is blanket in form, attempting no separation of legal from allegedly illegal acts.

In its written opinion the Trial Court stated:

> "* * * I am constrained to grant the injunction prayed for against all picketing by the defendant Union" (R. 180).

The conclusions of law found by the Trial Court include the following:

> "2. That the plaintiffs are the sole persons required to run their business and therefore they are not subject to picketing by a union or by the defendants who seek to compel them to employ union labor" (R. 59).
>
> "3. That the plaintiffs are entitled to a judgment and decree of this Court permanently restraining and enjoining the defendants, the members of the defendant Union, their servants, agents and employees, and all other persons acting in conjunction with them from picketing the plaintiffs and the places of business of the manufacturing bakers who sell to them and of the

customers who buy from them, and in any other way that may prevent the plaintiffs from peacefully and harmlessly conducting their business" (R. 60).

The injunction issued by the Trial Court enjoins the defendants:

"(a) From picketing the places of business of manufacturing bakers who sell to the plaintiffs or either of them because of the fact that said manufacturing bakers sell to these plaintiffs; and

(b) From picketing the places of business of customers of these plaintiffs because such customers purchase baker products from these plaintiffs; * * *" (R. 62).

There having been no claim of picketing upon private property in this case, it is apparent that the injunction is not designed to prevent trespass, but is definitely directed against picketing in public places. The decision of the Trial Court expressly found that the picketing was "in the vicinity of the place of business of Diamond Baking Co. Inc.," and "in the vicinity of the place of business of Bernstein & Dickerman" (R. 57, 58).

Obviously the injunction of all labor activities, peaceful or otherwise, is based upon the single erroneous proposition that picketing, whether peaceful or violent, orderly or disorderly, is not permissible in the absence of an employment relationship between the parties. This is clearly shown by the findings of the Trial Court which, as we have already noted, remained undisturbed upon appeal. The Trial Court found:

"That the aforementioned placards were truthful in all respects, and contained no misstatements or misrepresentations" (R. 58).

And:

"That the picketing so conducted aforementioned was done in a peaceful and orderly manner, without violence or threat thereof and in no respect was it or did it create disorder" (R. 58).

And on these facts the Trial Court concluded:

> "That the plaintiffs are the sole persons required to run their business and therefore they are not subject to picketing by a Union or by the defendants who seek to compel them to employ Union labor" (R. 59).

Upon appeal to the Appellate Division of the Supreme Court of the State of New York, First Department, the judgment below was affirmed by a divided Court, the majority writing no opinion. The dissenting opinion of Mr. Justice Callahan, in which Mr. Justice Dore concurred, held that whether or not the controversy in question be deemed a statutory labor dispute, the conduct of the defendants was lawful and should not have been enjoined (R. 189, 190).

Upon appeal to the Court of Appeals the judgment below was unanimously affirmed without opinion. The judgment of affirmance of the Court of Appeals was entered on December 31, 1940.

II. Jurisdiction of This Court

The judgment here in question is a final judgment, rendered after trial of the action, absolutely and permanently enjoining the peaceful and orderly labor activities of the defendant Union.

The judgment has been affirmed by the Court of Appeals of the State of New York, the highest Court of that State in which a decision could be had.

The defendant Union and the individual defendants urged upon the New York State Courts their contention that the said final judgment violated their privileges and immunities under the Federal Constitution, in that they were restrained from the exercise of their rights of freedom of speech and assembly. This contention was overruled, and the absolute injunction of the Trial Court was not modified in any respect.

A substantial Federal question was thus presented, and this Court clearly has jurisdiction to issue a writ of certiorari to the Court of Appeals of the State of New York, pursuant to Section 237-b of the Judicial Code of the United States (28 U. S. C., Sec. 344-b).

III. Questions Presented

Stated in concise form, the questions here presented are as follows:

1) May a State Court absolutely enjoin admittedly peaceful and orderly picketing by a legitimate labor organization, merely because that picketing is not directed against an employer of members of the Union?

2) Assuming that the previous question must be answered in the negative, should an exception to the rule be established because in this case the Union was protesting against the peddler system rather than against the labor practices of a specific employer?

In the discussion of the reasons for the allowance of the writ sought by the petitioner, immediately following, we shall consider in detail the foregoing questions.

IV. Reasons for Allowance of Writ

The absolute injunction issued by the New York State Supreme Court against the petitioners violates the guarantees of freedom of speech and assembly provided in the Federal Constitution.

> Constitution of the United States, Amendment XIV, Section 1.

The dissemination of information concerning the facts of a labor dispute has definitely been held to be within the area of free discussion which is guaranteed by the Constitution, whether the mode of dissemination employed involves the use of the spoken word or the carrying of banners or placards in the course of activity commonly known as picketing.

Senn v. *Tile Layers Union,* 301 U. S. 468.
Hague v. *C. I. O.,* 307 U. S. 496.
Schneider v. *State,* 308 U. S. 147.
Thornhill v. *Alabama,* 310 U. S. 88.
Carlson v. *California,* 310 U. S. 106.
Milk Wagon Drivers Union v. *Lake Valley Farm Products,* 311 U. S. 91.
Milk Wagon Drivers Union v. *Meadowmoor Dairies, Inc.* (No. 1, October Term, 1940).
American Federation of Labor v. *Swing* (No. 56, October Term, 1940).

Whether or not the present controversy, as a matter of New York State law, ought properly to be designated as a statutory labor dispute, within the meaning of Section 876-a of the Civil Practice Act of New York, is not material here, and we are not concerned with the decision reached by the State Courts in that respect, for the decision of that question does not affect the existence of the Federal question here at issue.

It has been definitely held by this Court that "members of a Union might, without the special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution".

Senn v. *Tile Layers Union,* 301 U. S. 468, 478.

The picketing here in question consisted of nothing more than the dissemination of the Union's contentions with respect to the evils of the peddler system, and such

expression of opinion was entitled to the protection of the constitutional guarantee. If, in any respect, the activity of the Union exceeded the bounds of the area of free discussion and penetrated the area of coercion or violence, an injunction directly solely against the excesses of conduct, might properly have been issued, but unless the entire program of activity was permeated by violence or illegality, an injunction absolute in form was unauthorized.

> *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.* (No. 1, October Term, 1940).

This Court has recently stated in unequivocal language that the mere absence of the employment relation between the parties furnishes no authority for the issuance of an injunction by a State Court forbidding peaceful persuasion and peaceful picketing.

> *American Federation of Labor* v. *Swing* (No. 56, October Term, 1940).

The injunction granted by the Supreme Court of the State of New York in the case at bar was in direct contradiction of the principles clearly stated by this Court in the *Swing* case.

National Importance of the Questions at Issue

As is evidenced by *Milk Wagon Drivers Union* v. *Lake Valley Farm Products* and *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, which have recently come before this Court, and as is also evidenced by the case at bar, and others which have arisen during the last few years, a great number of employers throughout the country have, since the enactment of comparatively recent legislation for the benefit of employees, including the Social Security Act and Unemployment Insurance laws, endeavored to dissolve the orthodox employment relationship wherever possible. The

form of the substituted relationship, whether it be called a "vendor system" or a "peddler system", has usually been such as to make it possible for the employer to label the erstwhile employee as an independent entrepreneur.

The creation and extension of this new economic relationship definitely opposes the aims of the established labor organizations of this country. In the vast economic area in which vendors or peddlers may, conveniently for employers, be set up, the existing Unions will necessarily decline as the vendors and peddlers increase. The two systems, as presently constituted, cannot coexist. The peddler, insulated by the honorific title of independent entrepeneur, acknowledges no uniform standards of wages or hours. The Union, on the other hand, as the very basis of its existence, advocates a standard of wages and hours related to social necessities. If the various State Courts are permitted to establish rules whereby Unions may not in self-defense publicly protest against the assault to which they are now being subjected, the industrial field which peddlers and vendors will shortly occupy will unquestionably be immense. The interests of industry and of labor cut across State lines, and decisions in one State affect labor relations in other States. This Court is not asked to pass upon the merits of the controversy. It is asked, however, to preserve the fundamental civil rights of both groups of contestants. We have pointed out the vast scale upon which the conflict is about to be carried on as indicative of the urgency of the establishment by this Court of fair rules of conflict, so that the evolution of new industrial forms in this country may proceed within the framework of the Constitution.

WHEREFORE, your petitioners and each of them respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals of the State of New York demanding that Court to certify and send to this Court for review and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings in the case, entitled on its docket *Hyman Wohl and Louis Platzman* v. *Bakery and Pastry Drivers and Helpers Local 802 et al.*, and that the order and judgment of the said Court of Appeals may be reversed, and that your petitioners may have such other and further relief as may be just and proper.

BAKERY AND PASTRY DRIVERS AND HELPERS
LOCAL 802
of the International Brotherhood of Teamsters,

PETER SULLIVAN,
individually and as President of said Union,

PADDY SULLIVAN,
individually and as an officer of said Union,

HYMAN BERNSTEIN,
individually and as business agent of said Union,

Petitioners,

By EDWARD C. MAGUIRE,
Attorney for Petitioners.

EDWARD C. MAGUIRE,
SAMUEL J. COHEN,
of Counsel.

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BAKERY AND PASTRY DRIVERS AND HELPERS LOCAL 802 of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, PETER SULLIVAN, individually and as President of the said Union PADDY SULLIVAN, individually and as an officer of the said Union, and HYMAN BERNSTEIN, individually and as business agent of said Union, all of 265 West 14th Street, New York City,

Petitioners,

against

HYMAN WOHL and LOUIS PLATZMAN,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. Opinions of Courts Below

The Supreme Court of the State of New York made findings of fact and conclusions of law (R. 46-60) and rendered an opinion in writing (14 N. Y. Supp. [2nd] 198; no official report) (R. 179, 180). The majority of the Appellate Division of the Supreme Court of the State of New York, First Department, wrote no opinion. The minority opinion was written by Mr. Justice Callahan, Mr. Justice Dore concurring (259 App. Div. 868, 19 N. Y. Supp. [2nd] 811) (R. 189, 190). The Court of Appeals of the State of New York wrote no opinion (284 N. Y. 220).

II. Jurisdiction

The statutory provision believed to sustain the jurisdiction of this Court to review the judgment of the Court of Appeals of the State of New York is Section 237-b of the Judicial Code of the United States (Title 28, U. S. C., Sec. 344-b).

Date of Entry of Judgment to be Reviewed

The judgment of the Court of Appeals of the State of New York here sought to be reviewed was entered on December 31, 1940. The petition is timely within the requirements of Section 243 of the Judicial Code of the United States (Title 28, U. S. C., Sec. 350).

III. Statement of the Case

A summary statement of the facts has already been made in the preceding petition for certiorari, pages 2-7, which in the interest of brevity is hereby adopted and made a part of this brief.

IV. Specification of Errors to be Urged

The Court of Appeals of the State of New York erred in holding that an absolute injunction against peaceful and orderly picketing could properly issue merely because no employment relationship existed between the members of the defendant Union and the peddlers and wholesale and retail bakers. This holding necessarily violated the constitutional guarantee of freedom of speech and assembly, for there was no local question involved which furnished a basis for deciding the case without reference to the Federal question. If in any respect the activities in ques-

tion exceeded the bounds of the area of freedom of speech and assembly guaranteed by the Constitution, the State Court should have separated the illicit conduct from the licit, and enjoined the former while protecting the latter. There was no justification, however, for the issuance of an indiscriminate blanket injunction. Such is the single but fundamental error here urged.

V. Summary of Argument

A) The injunction issued by the State Court violated the constitutional guarantee of freedom of speech and assembly.

1) The activity in question consisted solely of the peaceful and orderly dissemination of the opinions of the defendant Union.

2) Restraint of such activity by judicial decree as well as by statute is forbidden by the decisions of this Court.

B) There was no local question involved which furnished a basis for deciding this case without reference to the Federal question.

VI. ARGUMENT

A) The injunction issued by the State Court violated the constitutional guarantee of freedom of speech and assembly.

1) The activity in question consisted solely of the peaceful and orderly dissemination of the opinions of the defendant union.

There was no dispute whatever with respect to the peaceful and orderly character of the picketing conducted by the defendants in protest against the peddler system. As has been noted in the statement of facts set forth in the

petition for certiorari hereunto annexed, the Trial Court specifically found:

> "That the picketing so conducted aforementioned was done in a peaceful and orderly manner, without violence or threat thereof and in no respect was it or did it create disorder" (R. 58).

As to the duration of the picketing, the Court found:

> "That the picketing aforementioned lasted less than two hours" (R. 57).

As to the number of persons engaged in picketing, the Court found:

> "That at neither of the times aforementioned when picketing was conducted was there more than two pickets in the vicinity of the place of business of the Diamond Baking Co., Inc., and there was but one picket at the time that picketing was conducted in the vicinity of the place of business of Bernstein & Dickerman" (R. 58).

As to the truthfulness of the placards carried by the pickets, the Court found:

> "That the aforementioned placards were truthful in all respects and contained no misstatements or misrepresentations" (R. 58).

As to the interference with customers or members of the public, the Court found:

> "It was not established and there was no evidence that any customers of the Diamond Bakery Co., Inc. or Bernstein & Dickerman turned away and failed to deal with such firms by reason of said picketing" (R. 58).

As to damage suffered by the plaintiffs, the Court found:

> "That neither of the plaintiffs established or even offered evidence showing or tending to show that they sustained monetary loss to any extent" (R. 59).

As to the direct, legitimate and substantial economic interest which the Union had in the subject of the controversy, which it sought to protect by publicly protesting against the maintenance and extension of the peddler system, the Court found:

> "That 'peddlers' or independent jobbers are not covered by Workmen's Compensation Insurance, Social Security or Unemployment Insurance, and that an employer who changes his method of distribution from using employee drivers to 'peddlers' or independent jobbers saves considerable by way of premiums and taxes" (R. 52).
>
> "That if those who are presently employers and parties to contracts with the unions upon the expiration of those contracts, to survive, are required to adopt the 'peddler' system of distribution, then the wages, hours, working conditions, six-day week, etc., attained by the union after long years of struggle will be destroyed and lost" (R. 52).

None of these findings was altered in a single respect by the Appellate Division of the Supreme Court, or by the Court of Appeals, and there can be no question that they truly set forth the facts of this case.

In view of these facts, the issues presented to the State Courts were necessarily narrow. There were but two basic questions: First, whether a statutory labor dispute existed. If this were found, it would require dismissal of the complaint, for there was failure to comply with the prescribed procedure. Second, whether in the absence of a statutory labor dispute under New York State law, the conduct in question was nevertheless lawful and constitutionally immune from injunctive restraint.

It is apparent that the decision of the first question could not determine the case unless the decision were in favor of the defendants, as the State Court would still have to pass on the fundamental constitutional question. The State Court in rendering judgment in favor of the plain-

tiffs therefore necessarily decided both questions against the defendants.

We are not here concerned with the first question. The issue before this Court is limited to the second question.

2) The constitutional guarantees here invoked.

The injunction issued by the New York State Supreme Court was in direct contravention of the Fourteenth Amendment to the Constitution of the United States in that thereby the State of New York was enforcing a law which abridged the privileges and immunities of the defendants as citizens of the United States and in that thereby the defendants were deprived of liberty without due process of law.

3) The decision of the New York State Court of Appeals is inconsistent with the decisions of this Court.

No element can be found in the case at bar which justifies departure from the rules laid down by this Court in *Milk Wagon Drivers Union* v. *Meadowmoor Dairies* (No. 1, October Term, 1940) and *American Federation of Labor* v. *Swing* (No. 56, October Term, 1940).

As is shown by the statement of facts set forth in the petition for certiorari annexed hereto, which we have incorporated in this brief by reference, the "peddler system" in the bakery industry in New York City is substantially identical with the "vendor system" in the dairy industry in Chicago, which was described in detail and analyzed by this Court in *Milk Wagon Drivers Union* v. *Lake Valley Farm Products, Inc.* (311 U. S. 91).

In that case, as in this, the Union protested against the maintenance and extension of an arrangement whereby employers who had formerly distributed their products through their own employees, engaged pursuant to the orthodox employment relationship, discharged their employees and effected distribution by means of "peddlers" or "vendors". In that case, as in this, it appeared that

with the spread of the new system of distribution Union standards would necessarily suffer. In that case, as in this, the Union attempted to unionize the peddlers, and, failing this, conducted picketing at the places where the peddlers did business. There was but one vital distinction between the two cases, to wit, that in the *Milk Wagon Drivers* case the Union committed acts of violence, whereas in the case at bar the activities of the defendants were utterly peaceful.

Although we have referred to *Milk Wagon Drivers Union* v. *Lake Valley Farm Products, Inc.* (311 U. S. 91) because of the similarity of the facts involved, we do not rely upon it as a controlling authority, for we recognize that the primary question there presented was the applicability of the Norris-LaGuardia Act, which does not confront us here. The same facts, however, came once more before this Court in the second *Milk Wagon Drivers* case, *Milk Wagon Drivers Local 753* v. *Meadowmoor Dairies, Inc.*, and the latter case bears directly upon the issues with which we are concerned.

In passing upon the power of the Illinois Supreme Court to issue an injunction against peaceful picketing, this Court, in the second *Milk Wagon Drivers* case, upheld the injunction only upon the limited ground that a definite finding had been made that the extreme violence which had been practiced so thoroughly permeated all of the conduct of the defendants that subsequent peaceful acts would necessarily be tainted thereby and would continue to have a coercive effect. The conduct of the defendants was described as follows:

> "The picketing in this case was set in a background of violence. In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful. So the Supreme Court of Illinois found. We cannot say that such a finding so contradicted experience as to warrant our rejection."

The Court definitely indicated, however, that, except for such background of violence, the injunction of the Illinois Supreme Court would have been held to violate the Fourteenth Amendment.

> "The injunction which we sustain is 'permanent' only for the temporary period for which it may last. It is justified only by the violence that induced it and only so long as it counteracts a continuing intimidation."

The precise issue here involved was before this Court in the recent case of *American Federation of Labor* v. *Swing* (No. 56, October Term, 1940). In its opinion the Court stated the issue as follows:

> "Is the Constitutional guarantee of freedom of discussion infringed by the common law policy of a state forbidding resort to peaceful persuasion through picketing merely because there is no immediate employer-employee dispute?"

Although in the *Swing* case there was a claim that the defendants' placards were libelous, and that the defendants had committed acts of violence, the Court nevertheless struck down the injunction because it failed to except acts of peaceful persuasion.

The case at bar must be governed by the principle definitely enunciated in the *Swing* case that "The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state", unless this Court is willing to recognize an exception based on no more tangible a distinction than the peculiar nature of the peddler system.

The activities of the defendants in question consisted solely of the following courses of conduct:

1) Carrying of placards in public places reading as follows:

"HYMAN WOHL

A BAKERY ROUTE DRIVER WORKS SEVEN DAYS A WEEK WE ASK EMPLOYMENT FOR A UNION RELIEF MAN FOR ONE DAY HELP US SPREAD EMPLOYMENT & MAINTAIN A UNION WAGE HOUR AND CONDITION.

BAKERY & PASTRY DRIVERS & HELPERS
LOCAL 802 I. B. of T. affiliated
with A. F. L." (R. 57)

2) Requesting about five retail dealers in bakery products, who were customers of the plaintiffs, not to deal with the plaintiffs unless the plaintiffs would conform to the established Union standards (R. 58, 59).

3) Requesting Diamond Baking Co., Inc. and Bernstein & Dickerman, the two wholesale bakers who distributed their products through the plaintiff peddlers, not to continue such method of distribution unless the plaintiffs would conform to Union standards (R. 48, 49).

The legal propriety of each of these courses of conduct is clear.

1) The carrying of the placards was conduct immune from statutory or judicial restraint under the decisions of this Court in *Thornhill* v. *Alabama, Carlson* v. *California* and *American Federation of Labor* v. *Swing.*

2) The request made to the retail dealers in bakery products was similar to the activity of the Union involved in the cases of *Milk Wagon Drivers* v. *Lake Valley Farm Products, Inc.* and *Milk Wagon Drivers* v. *Meadowmoor Dairies, Inc.,* except that in the case at bar no violence or threat thereof was involved. The findings of fact of the Trial Court show that no suggestion of pressure other than a lawful appeal to the public was ever made by the defendants. The defendants merely informed the retail dealers of the Union's policy in regard to the peddler

system and stated that a picket with a placard in the form above quoted would be placed in the neighborhood if the Union's request was denied:

> "That on the 25th day of January 1939, a member of the defendant union followed plaintiff Platzman as he was distributing his products, and went into two or three places of business of said plaintiff's customers and advised one of said customers that the union was seeking to persuade the plaintiff to work but six days per week and employ a union driver as a relief man, and further stated to the said one customer that in the event he continued to purchase from plaintiff Platzman, that on the following day a picket would be placed in the vicinity of said store with a placard reading as heretofore set forth" (R. 58, 59).

Since the placard was unobjectionable, and the parading thereof was a lawful act, the threat to carry the placard in public places was necessarily lawful, for that which may lawfully be done may lawfully be threatened.

3) What has been said with regard to item 2 applies with equal force to item 3. The requests made to the wholesale bakers, Diamond Baking Co., Inc. and Bernstein & Dickerman, were the same as those made to the retail dealers. It was not suggested in any instance that the penalty to be suffered by the wholesalers for refusal would be other than lawful picketing with the placards above described (R. 48, 49).

The conclusion is inevitable that in restraining the conduct aforesaid the Courts of the State of New York were violating the rights of the defendants guaranteed by the Constitution of the United States.

We believe it to be of the utmost importance that this Court clearly rule that the holding of the *Swing* case is applicable to situations involving peddler and vendor systems, so that chaotic industrial conditions may not ensue in the many fields where employers are now experimenting with such systems. As has been indicated in the accompanying petition, the question is of national importance

because, as will be judicially noticed, the vital interests of industry and of labor cut across State lines, and the establishment of a peddler system in one State definitely affects labor relations in other States. Divergent views on the part of various State Courts with respect to this Federal question are, therefore, from any broad view of the general welfare, utterly intolerable.

B) There was no local question involved which furnished a basis for deciding this case without reference to the Federal question.

As has been noted, there were but two issues presented to the New York State Courts:

1) Whether a statutory labor dispute was involved.

2) Whether in the absence of a statutory dispute the peaceful activities of the defendants were subject to injunctive restraint.

We have already pointed out that decision of the first question, unless in favor of the defendants, could not be determinative of the case, so that the State Courts necessarily had to pass upon the second question, which was essentially a Federal question, in order to arrive at a decision in favor of the plaintiffs.

It is, therefore, of no consequence, so far as the granting of the writ requested is concerned, that none of the New York State Courts discussed the constitutional question in any written opinion. The only opinions written were those of the Trial Court and of the minority of the Court in the Appellate Division. Neither the majority of the Appellate Division of the Supreme Court nor the Court of Appeals ventured to express in writing the opinions which grounded their decisions. This reluctance to give articulate expression to judicial rationale may not be permitted, however, to obliterate the defendants' constitutional

rights, for it has been demonstrated that, albeit silently, the question at issue was necessary resolved.

The defendants did not fail to remind the New York State Courts of the existence of the constitutional question.

In the Trial Court the issue was specifically raised by the defendants' answer, which alleged that the defendants "acted wholly within their constitutional rights" (R. 13).

The question was again raised in the briefs submitted by the defendants to both the Appellate Division of the Supreme Court and the Court of Appeals.

In presenting the case to the Court of Appeals we argued in our written brief in the following language:

> "The appellants respectfully submit that the absolute injunction granted herein by the lower Court, in a case where it was conceded that no damage was done by the defendants, and where it plainly appeared that the defendants had just cause for engaging in the activities in question, was a serious violation of the rights of freedom of speech and assembly guaranteed by the Federal Constitution."

Hague v. *C. I. O.* (307 U. S. 496), *Thornhill* v. *Alabama* (310 U. S. 88) and *Carlson* v. *California* (310 U. S. 106) were cited by us in support of that argument. The above quoted paragraph from our brief in the Court of Appeals was in identical language included in the brief submitted to the Appellate Division. There was obviously no laxity on the part of the defendants in asserting their constitutional rights, privileges and immunities.

The reference to the establishment of the "law of the case" as the ground for its decision, contained in the opinion of the Trial Court, is not, apart from any question as to its correctness as a matter of State law, significant here. As the opinion definitely recites, the decision made upon the previous motion for a temporary injunction held merely that "a labor dispute was not involved". This, as we have seen, could not determine the entire case, unless

the decision was in favor of the defendants. It is, therefore, immaterial here whether the defendants adequately preserved their rights with respect to the existence of a statutory labor dispute under New York law.

No other factors were present in the case which would justify elimination of the Federal question. The plaintiffs admitted that the defendants' conduct was free from violence, disorder or fraud. We have recited the facts in detail in this brief and in the accompanying petition, and it is respectfully submitted that no other element of illegal conduct on the part of the defendants, sufficient to justify a total injunction, existed. The plaintiffs have at various points in the progress of this case applied the epithet of "secondary boycott" to the defendants' conduct. As to this, we say that within the rulings of the Court in the second *Milk Wagon Drivers* case and the *Swing* case, it is clear that no illegal boycott was here involved. We do not halt at this point, however, but we proceed further and say that, even if in any respect the conduct of the defendants was overzealous to such an extent that it might properly be characterized as constituting an improper boycott, this furnished no ground for a total injunction. Even under such circumstances the State Courts were under a duty to separate the lawful from the unlawful, and to restrain only the latter.

CONCLUSION

The writ of certiorari requested by the petitioners should be granted, the judgment of the Court of Appeals of the State of New York should be reviewed by this Court, and the said judgment should be reversed.

Respectfully submitted,

EDWARD C. MAGUIRE,
Attorney for Petitioners.

Of Counsel:
EDWARD C. MAGUIRE,
SAMUEL J. COHEN.

No. 901

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CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

BAKERY AND PASTRY DRIVERS AND HELPERS LOCAL 802 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, PETER SULLIVAN, individually and as President of the said Union, PADDY SULLIVAN, individually and as an officer of the said Union, and HYMAN BERNSTEIN, individually and as business agent of said Union, all of 265 West 14th Street, New York City,

Petitioners,

against

HYMAN WOHL and LOUIS PLATZMAN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HYMAN WOHL,
LOUIS PLATZMAN,
Respondents in Person.

Of Counsel:
JOSEPH APFEL.

ACKERMAN PRESS, Inc., 142 Liberty St., Phones RE ctor 2-5856-7

INDEX.

PAGE

I. Statement of the Case 1

II. Argument 3

A. This Court cannot review the decision of the Court of Appeals of the State of New York because a federal question was not presented for decision and that the Court of Appeals in making its decision did not pass on any federal question 3

B. There being no labor dispute, the injunction did not violate the constitutional guarantee of freedom of speech and assembly 4

Conclusion 5

TABLE OF CASES CITED.

	PAGES
Brown v. Atwell, 92 U. S. 327	4
Carlson v. California, 310 U. S. 106	4
City of Buffalo v. Schleifer, 2 Misc. Rep. (N. Y.) 216	2
City of Chicago v. Bartee, 100 Ill. 57	3
Collender v. Reardon, 138 A. D. (N. Y.) 738	3
Commonwealth v. Farnum, 114 Mass. 267	3
Gitlow v. New York, 268 U. S. 652	5
Honeyman v. Hanan, Executor, 300 U. S. 14	3
Louisville and Nashville Railroad Company v. Woodford, 234 U. S. 46	4
Lynch v. New York ex rel. Pierson, 293 U. S. 52	4
Milk Wagon Drivers Union v. Lake Valley Farm Products, 311 U. S. 91	2, 4
Patterson v. Colorado, 205 U. S. 454	4
Schneider v. State, 308 U. S. 147	4
Senn v. Tile Layers Union, 301 N. S. 468	4
Thornhill v. Alabama, 310 U. S. 88	4
Zucht v. King, et al., 260 U. S. 174	3

STATUTE CITED.

Civil Practice Act of New York, Section 876-a	4

IN THE

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OCTOBER TERM, 1940.

BAKERY AND PASTRY DRIVERS AND HELPERS LOCAL 802 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, PETER SULLIVAN, individually and as President of the said Union, PADDY SULLIVAN, individually and as an officer of the said Union, and HYMAN BERNSTEIN, individually and as business agent of said Union, all of 265 West 14th Street, New York City,

Petitioners,

against

HYMAN WOHL and LOUIS PLATZMAN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I. Statement of the Case.

The respondents' case has been conceded by the petitioners. They have admitted that they have been unable to disprove any of the evidence offered by the respondents. Notwithstanding this fact, the petitioners in their brief omitted to mention vital facts which are more than sufficient to have this Court deny this application.

The respondent Wohl has been, at the time of trial, engaged as an independent peddler for more than 5 years

(R. 64). At the time of trial, he purchased his baked products from four bakers (R. 64, 87). That he had no contract with anyone of them and that he was at liberty to buy from any other baker (R. 65). That he owns his own truck and had owned a truck during the said 5 years (R. 65, 66, 153). That he did not employ anyone (R. 67) and was able to manage his own business without any help (R. 67).

The respondent Platzman testified that he has been in the same business for 2 years and purchased his baked products from two bakers (R. 99, 100). That he was always at liberty to buy from whomever he wanted (R. 101). That he had no contract with any baker (R. 101). He further testified that he could manage his own business without any help and that he employed nobody.

The foregoing is in short the respondents' case and it is called to the attention of this Honorable Court because the decision of this Court may be based thereon. The instant case differs from the case of Milk Wagon Drivers Union v. Lake Valley Farm Products, 311 U. S. 91, in that in the latter case there was a contract between the vendors and the dairy and furthermore the vendors were actually in the employ of the dairy. In that case there was a labor dispute. In the instant case, there was no labor dispute (R. 59).

It is unnecessary to call to this Court's attention any more of the facts as the determination of this application does not depend thereon. However, the respondents want to correct a serious error committed by the petitioners in their petition and that is that the peddler system was not contrived by the wholesale bakers to effect distribution of their bakery products without technically engaging any distribution employees. The petitioners were given an opportunity to prove such a conspiracy, but they admitted that they were unable to do so (R. 130, 142, 143).

Peddling of merchandise by independent individuals has been in existence from time immemorial. City of Buffalo v. Schleifer (2 Misc. Rep. [N. Y.] 216).

The Court's attention is called to the following cases which are to the same effect:

Collender v. Reardon, 138 A. D. (N. Y.) 738;
City of Chicago v. Bartee, 100 Ill. 57;
Commonwealth v. Farnum, 114 Mass. 267.

II. ARGUMENT.

A. This Court cannot review the decision of the Court of Appeals of the State of New York because a federal question was not presented for decision and that the Court of Appeals in making its decision did not pass on any federal question.

Reading the record in this case, it is obvious that no federal question was presented to the Trial Court nor to the Appellate Division. It is necessary that such a question be presented to the lower Court and the proper objections taken (Zucht v. King, et al., 260 U. S. 174). Furthermore the federal question must be substantial in character. These necessary elements are absent in this case.

It is true that in their memorandum to the Court of Appeals, the petitioners made a reference to a federal question. The entire reference is set forth on page 24 of their argument. This is not sufficient to allow this Court to review the decision of the State Court. It must also be shown that the highest Court in the state in making its decision had to determine the federal question. There is nothing in the record from which such an inference can be drawn.

In the case of Honeyman v. Hanan, Executor, 300 U. S. 14, this Court said on page 18:

> "Before we may undertake to review a decision of the court of a State it must appear affirmatively from the record, not only that a federal question was presented

to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause."

Lynch v. New York ex rel. Pierson, 293 U. S. 52;
Brown v. Atwell, 92 U. S. 327;
Louisville and Nashville Railroad Company v. Woodford, 234 U. S. 46;
Patterson v. Colorado, 205 U. S. 454.

B. There being no labor dispute, the injunction did not violate the constitutional guarantee of freedom of speech and assembly.

The Trial Court decided and found as a conclusion of law (R. 59):

"1. That the order of Mr. Justice Charles B. McLaughlin, dated January 17, 1939, established the law of the case in that a labor dispute was not involved in this action and that Section 876a of the Civil Practice Act did not apply and upon the facts as found a labor dispute was not involved."

The Court of Appeals of the State of New York affirmed that decision without any opinion (284 N. Y. 220). This Court is bound by that decision.

The cases cited by the petitioners in their brief are not controlling.

Thornhill v. Alabama, 310 U. S. 88;
Senn v. Tile Layers Union, 301 U. S. 468;
Schneider v. State, 308 U. S. 147;
Milk Wagon Drivers Union v. Lake Valley Farm Products, 311 U. S. 91;
Carlson v. California, 310 U. S. 106.

In all of the foregoing cases there was a labor dispute. When there is a labor dispute, the unions have the right to free speech and free assembly, but in the instant case, there is no labor dispute.

The constitutional guarantee of free speech is not absolute (Gitlow v. New York, 268 U. S. 652).

In the case at bar, it is, without a questionable doubt, illegal for the petitioners to picket or strike or to carry placards when there is no labor dispute. It is immaterial whether the dissemination of the opinions of the petitioners are performed in a peaceful and orderly manner.

The sole question was whether there existed a labor dispute. That question was decided against the petitioners. As a result of the decision, the conduct of the petitioners in picketing the respondents, no matter how peaceful and orderly the picketing has been conducted, is unlawful and must be enjoined.

CONCLUSION.

The writ of certiorari requested by the petitioners should be denied.

Respectfully submitted,

HYMAN WOHL,
LOUIS PLATZMAN,
Respondents in Person.

Of Counsel:
JOSEPH APFEL.